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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1991

HARRY V. MOHNEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHERE THE PROSECUTION MISUSES ITS IMMUNITY POWER, AND MISLEADS THE COURT AND THE DEFENSE IN CONNECTION THEREWITH, DISTORTS THE FACT-FINDING PROCESS AND DESTROYS A DEFENDANT'S CONSTITUTIONAL RIGHT TO PRESENT AN EFFECTIVE DEFENSE, DOES IT VIOLATE DUE PROCESS?

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No. _____

In The

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HARRY V. MOHNEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner ("Mohney") respectfully moves for Writ of Certiorari to review the judgment of the Sixth Circuit Court of Appeals entered on November 27, 1991.

OPINIONS BELOW

The Opinion of the Sixth Circuit Court of Appeals is reported at 949 F.2d 1397 (6th Cir. 1991) and is reproduced as Appendix A. The May 29, 1990 Order of the District Court for the Eastern District of Michigan denying a Motion for Judgment of Acquittal or New Trial is an unreported decision and is attached as Appendix B.

JURISDICTION

The order of the Sixth Circuit Court of Appeals affirming Mohney's conviction was entered on November 27, 1991. This Petition is filed within ninety (90) days of that date. This Court has jurisdiction to review the decision pursuant to 28 U.S.C. § 1254 and Rule 13 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Relevant portions of the Fifth and Sixth Amendments to the United States Constitution are set forth in Appendix C.

STATEMENT OF THE CASE

1. The Charges: Mohney was charged with three counts of filing false individual tax returns and three counts of aiding in the filing of false corporate tax returns for International Amusements, Ltd. ("International") in violation of 26 U.S.C. § 7206 (1) and (2).

The Indictment included a conspiracy count which charged Mohney, Thomas Tompkins ("Tompkins"), Elizabeth Scribner ("Scribner"), and Lee J. Klein ("Klein") with conspiring to defraud the United States in violation of 18 U.S.C. § 371. The conspiracy count was dismissed prior to trial. Tompkins and Scribner were employees of Modern Bookkeeping Services ("Modern"); Tompkins was the accountant who prepared the tax returns, and Scribner was Modern's manager. Klein was a tax attorney

retained both by Modern and Mohney. Because the conspiracy count was dismissed prior to trial, Mohney was tried alone on the six false return counts[1].

2. Facts: The trial concerned only Mohney and International. International owned and serviced quarter-operated video machines, which it placed in bookstores and arcades throughout the United States. International's machines generated revenue which was shared, or "split" with the store in which the machine was located. The store's share was paid to it either by International's driver leaving a portion of the machine receipts with the store manager, by the store owner picking up his share at International, or by International paying for improvements for the store. The machine receipts not retained by International were not included in its gross income; thus the allegation that its income was understated.

Although Mohney was not a shareholder or officer of International, the Government contended that he maintained control of the business.

3. The Trial: At trial, the government called fifty-two witnesses over a nine week period. The issues at trial were these:

(1) Were International's gross receipts fraudulently understated?

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[1] The district court dismissed the conspiracy count in a reported decision, *United States v. Mohney*, 723 F. Supp. 1197 (ED Mich. 1989). The dismissal was reversed by the Sixth Circuit in *United States v. Mohney*, 949 F.2d 899 (6th Cir. 1991).

(2) If so, was Mohney in "control" of International and did he cause the understatement?

(3) Did Mohney treat International's undeclared income as his own?

(4) If so, did he fail to report it as income, rendering his individual tax returns false?

The government's case against Mohney was built by granting immunity to more than 20 witnesses. The foundation of its case was that International's tax returns were inaccurate. Establishing inaccuracies in International's tax returns *raised the question* concerning Mohney's guilt, it did not answer it. To establish Mohney's guilt, the prosecution pointed to Elizabeth Scribner. In its opening, throughout its case in chief, and in its closing, the prosecution contended that funds unreported by International went "through Scribner's hands" to Mohney.

In defending against the charges, Mohney was prepared to present evidence that he had no office at International, he travelled widely, maintained infrequent contact with International's operations and then only through Scribner, and was not knowledgeable concerning how its income was computed. Most critically, Mohney was prepared to present evidence that corporate funds handed to Scribner were not treated by him as his own. Mohney relied on calling witnesses from the government's witness list, in particular, Elizabeth Scribner.

Mohney knew prior to trial that the prosecution had obtained approval from the Department of Justice to grant Scribner immunity. The prosecution had subpoenaed her for trial, listed her on its witnesses list, and aggressively pursued her sequestration. In fact, when

Mohney objected to Scribner's sequestration, the prosecution *affirmed* to the court and the defense that it intended to immunize her and call her as a witness.

The prosecution's stated intention to grant Scribner immunity and call her as a witness was relied upon by Mohney. Scribner was the person most knowledgeable about the business, the treatment of International's corporate funds, Mohney's role at International, and whether Mohney used International's corporate funds as his own. Scribner had worked in a management capacity with Mohney for more than 20 years, and, according to the prosecution's theory, was the person who "handed International's corporate funds" to Mohney.

After presenting its nine week case-in-chief, the prosecution declared that it would not, after all, grant Scribner immunity or call her as a witness. Mohney was surprised by this last minute decision not to call Scribner. He moved to call her as a defense witness, but she asserted her privilege and refused to testify. Mohney moved to compel her immunity, but the motion was denied. Thereafter Mohney sought a mistrial, and it too was denied.

Mohney was suddenly left without any semblance of a defense. He called a few remote witnesses to testify that International's machine receipts were shared with the stores. These witnesses also testified that Mohney was not involved in running International, or involved in its banking, bookkeeping, or tax preparation. Only Scribner, however, could refute the prosecution's allegation that International's corporate funds went through her hands to Mohney. The prosecution, however, intentionally and

effectively prevented Mohney from obtaining Scribner's testimony.

Mohney's sandbagged defense was ineffectual. He was convicted on all six false return counts.

4. Post-Trial: Mohney filed a Motion for Acquittal or New Trial, arguing, *inter alia*, that he was denied a fair trial and due process by the government's misconduct in manipulating its immunity powers to distort the fact-finding process. The District Court denied the Motion. Mohney then appealed to the Sixth Circuit, and argued that he was denied a fair trial, due process and the right to present an effective defense. By order dated November 27, 1991, the Sixth Circuit affirmed his conviction. This Petition follows.

REASONS FOR GRANTING THE WRIT

WHERE THE PROSECUTION'S MISUSE OF ITS IMMUNITY POWER DISTORTS THE FACT-FINDING PROCESS AND DESTROYS A DEFENDANT'S CONSTITUTIONAL RIGHT TO PRESENT AN EFFECTIVE DEFENSE, IT VIOLATES DUE PROCESS, AND RAISES AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

Mohney asserts that the government's selective misuse of its immunity power was intentionally designed to destroy his ability to present an effective defense and distort the fact-finding process.

The Witness Immunity Act provides federal prosecutors with the power to compel testimony over a Fifth

Amendment claim. 18 U.S.C. §§ 6001-6005 (1982). The government's power to compel testimony from a witness is a necessary and vital power of the government. *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 93 (1964). And, although courts lack statutory authority to grant immunity on their own initiative, *United States v. Pennell*, 737 F.2d 521, 527 (6th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985); *United States v. Mendia*, 731 F.2d 1412, *cert. denied*, 469 U.S. 1035 (1984), courts have the responsibility to ensure that immunity decisions are made within the confines of due process. Where the government misuses its immunity power and selectively denies immunity to defense witnesses with the intention of denying a defendant the right to present an effective defense, and deliberately distorts the fact-finding process, a due process issue arises.

The due process issue arises because the confrontation and compulsory process clauses of the Sixth Amendment constitutionalize "the right in an adversarial criminal trial to make a defense as we know it." *Faretta v. California*, 422 U.S. 806, 818 (1975), citing *California v. Green*, 399 U.S. 149, 176 (1970) (Harlan, J. concurring). A defendant in a criminal prosecution has the right, at a minimum, to "put before the jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987). "Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973).

The standards of fairness under the due process clause require that a criminal defendant be afforded "a meaningful opportunity to present a *complete* defense"

California v. Trombetta, 467 U.S. 479, 485 (1984) (emphasis added).

As early as 1967, then Circuit Judge Warren Burger recognized that the government's misuse of its immunity power could result in a denial of due process. *Earl v. United States*, 361 F.2d 531, 534, n.1 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921 (1967).[2] In essence, Judge Burger recognized the due process problems raised when the government misuses its immunity power for its own advantage, while at the same time denying immunity for witnesses critical to presenting a defense.

It has long been recognized by the Supreme Court that the government may not abuse its discretion to render a trial unfair. *Brady v. Maryland*, 373 U.S. 83 (1963). And, although dictum in *United States v. Nixon*, 418 U.S. 683 (1974) suggests that the Supreme Court would find a violation of due process and the right to a defense where

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[2] "We might have quite different, and more difficult, problems had the government in this case secured testimony from one eyewitness by granting him immunity while declining to seek an immunity grant for Scott to free him from possible incrimination to testify for Earl. That situation would vividly dramatize an argument on behalf of Earl that the statute *as applied* denied him due process. Arguments could be advanced that in the particular case the government could not use the immunity statute for its own advantage unless Congress made the same mechanism available to the accused". *Id.*, at 534 n. 1 (emphasis original)

the government has misused its immunity power, the Court has not yet resolved the question.[3]

A. DISSENTION AMONG THE CIRCUITS

The most controversial issue concerning the government's power to grant immunity concerns immunity for defense witnesses who have refused to testify on the basis of their Fifth Amendment privilege. There remains dissention among the circuits concerning whether such immunity is, or should be, available, and if so, under what theory. *United States v. Anguilo*, 897 F.2d 1169, 1190 (1st Cir. 1990) [discussing theories of defense witness immunity].

Two distinct theories supporting defense witness immunity have evolved. The first theory is referred to as the "effective defense theory", which holds that a court has the power to immunize witnesses where the testimony is exculpatory and essential to an effective defense.

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[3] "The right to the production of all evidence at a criminal trial similarly has constitutional dimensions. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right "to be confronted with the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor." Moreover, the Fifth Amendment also guarantees that no person shall be deprived of liberty without due process of law. It is the manifest duty of the courts to vindicate those guarantees, and to accomplish that it is essential that all relevant and admissible evidence be produced". *Id.* at 711. *See also*, Mykkeltvedt, *United States v. Allesio – Due Process of Law and Federal Grants of Witness Immunity for Defense Witnesses*, 31 Mercer L. Rev. 689, 704-05 n. 70 (1980) arguing that the Supreme Court may support judicial grants of immunity to defense witness; *The Constitutional Right to Defense Witness Immunity*, 57 N.D.L. Rev. 187, 211, n. 166 (1981) (same).

The power is grounded in a court's responsibility to ensure due process. This theory is supported by *Government of the Virgin Islands v. Smith*, 615 F.2d 964, 974 (3rd Cir. 1980) [federal court may provide defense witness immunity where testimony is exculpatory and essential to the defense]. Other circuits have embraced the concept that the government's misuse of its immunity power could result in a violation of due process. *See, e.g., United States v. Pennell*, 373 F.2d 521, 527 (6th Cir. 1984); *United States v. Chagra*, 669 F.2d 241, 261 (5th Cir. 1982), *cert. denied*, 459 U.S. 846 (1982) [constitution may require defense witness immunity to protect a fair trial].

The second theory is the "government misconduct" theory. This theory holds that the government has the option of granting immunity to an essential defense witness, or suffering dismissal of the prosecution based on denial of due process. The Second, Fourth, Fifth, Seventh and Ninth Circuits have recognized a right to defense witness immunity in the event of prosecutorial misconduct. *United States v. Whittington*, 783 F.2d 1210, 1220 (5th Cir. 1986), *cert. denied*, 479 U.S. 882 (1987); *United States v. Todaro*, 744 F.2d 5, 9 (2d Cir. 1984), *cert. denied*, 469 U.S. 1213 (1984); *United States v. Taylor*, 728 F.2d 930, 934 (7th Cir. 1984); *United States v. Burns*, 684 F.2d 1066, 1077 (2d Cir. 1982), *cert. denied*, 459 U.S. 1174 (1983); *United States v. Gravely*, 840 F.2d 1156, 1161 (4th Cir. 1988); *United States v. Thevis*, 665 F.2d 616, 639 (5th Cir.) *cert. denied*, 459 U.S. 825 (1982); *United States v. Turkish*, 623 F.2d 769, 771 (2d Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981); *United States v. Klauber*, 611 F.2d 512, 517 (4th Cir. 1979), *cert. denied*, 446 U.S. 908 (1980); *United States v. Paris*, 812 F.2d 471, 477 (9th Cir. 1987).

The Sixth, Tenth, Eleventh and District of Columbia Circuits have stated that the question of defense witness immunity in the event of prosecutorial misconduct is unresolved. *United States v. Pennell*, 737 F.2d 521, 526 (6th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985); *United States v. Hunter*, 672 F.2d 815, 818 (10th Cir. 1982); *United States v. Sawyer*, 799 F.2d 1494, 1507 (11th Cir. 1986), *cert. denied*, 479 U.S. 1069 (1987); *United States v. Gottesman*, 724 F.2d 1517, 1524 n. 9 (11th Cir. 1984).

The First and Eighth Circuits have yet to resolve the question of defense witness immunity under either theory. *United States v. Eagle Hawk*, 815 F.2d 1213, 1217 (8th Cir. 1987), *cert. denied*, 108 S.Ct. 712 (1988); *United States v. Davis*, 623 F.2d 188, 192 (1st Cir. 1980).

Although courts have denied immunity in the immediate cases before them, they have acknowledged that it remains an open question. *United States v. Hunter*, 672 F.2d 815, 818 (10th Cir. 1982) [immunity of defense witnesses in the event of government misconduct is an open question]; *United States v. Sawyer*, 799 F.2d 1494, 1509 (11th Cir. 1986) [question of prosecutorial misconduct unresolved], *cert. denied*, 479 U.S. 1069 (1987); *United States v. Lord*, 711 F.2d 887, 891-92 (9th Cir. 1983) [if prosecutorial misconduct proved, court must order judgment of acquittal unless prosecutor grants use immunity to witnesses]; *United States v. Alessio*, 528 F.2d 1079, 1081 (9th Cir. 1976) [government must exercise discretionary power to grant immunity consistent with a defendant's Fifth Amendment due process right to a fair trial]; *United States v. Westerdahl*, 945 F.2d 1083 (9th Cir. 1991) [where government's case relies on immunized testimony, court

must hold a hearing to determine whether the fact-finding process was intentionally distorted].

B. THE FACTS IN THIS CASE PROVE A DENIAL OF DUE PROCESS

In Mohney's case, the government abused its immunity discretion, denied him the right to exculpatory evidence, denied him the right to present an effective defense, and intentionally distorted the fact-finding process. Mohney's trial was unfair and he was denied due process.

Specifically, prior to trial the government obtained approval from the Department of Justice to grant Elizabeth Scribner immunity. The government subpoenaed her for trial, listed her as a witness, and forced her sequestration over Mohney's objection by affirming that it would grant her immunity and call her as a witness. The government built its case by relying on the testimony of some twenty immunized witnesses, and by pointing to Scribner as the person who handed International's corporate funds to Mohney. Only after it completed its nine week case-in-chief did the government announce its changed intentions concerning granting Scribner immunity, devastating Mohney's ability to present a defense.

The government was obligated to exercise its immunity power within the bounds of due process. Instead, it selectively granted immunity to the witnesses it wanted, and refused immunity to the witnesses most critical to Mohney's defense, thereby distorting the fact-finding process.

Mohney was surprised by the government's last minute decision not to call Scribner. It was obvious that the *only chance* he had to gain acquittal was to show that corporate funds delivered to Scribner were not treated by Mohney as his own. Scribner's testimony would have been exculpatory, and at minimum, would have gone a long way to cast doubt on Mohney's guilt. After refusing to call her as witness or grant her immunity so Mohney could, the prosecution exacerbated the unfairness by arguing in closing that corporate funds handed to Scribner "must have been" handed to Mohney. This was particularly unfair because no one, in particular Ms. Scribner, had so testified.

This is exactly the situation appellate courts have envisioned in recognizing that misconduct, or the selective use of its immunity power, could distort the fact-finding process. *United States v. Westerdahl*, 945 F.2d 1083, 1086 (9th Cir. 1991) [misconduct is not confined solely to situations in which the government affirmatively induces a witness not to testify in favor of a defendant, but may be found where the government has intentionally distorted the fact-finding process]; *United States v. Anguilo*, 897 F.2d 1169 (1st Cir. 1990) [due process clause constrains the prosecution from distorting the fact-finding process]; *United States v. Capozzi*, 883 F.2d 608, 613 (8th Cir. 1989) [collecting cases].

The prosecution responded to Mohney's allegation by arguing that it did not intend to prevent Mohney's defense, or distort the fact-finding process, but rather, its refusal to grant Scribner immunity was unassailable because she was a "putative defendant". The prosecution contends that because it had previously indicted Scribner

and was appealing the district court's dismissal of the charges against her, it had a legitimate reason to refuse immunity.

The government's argument is designed to draw attention away from these crucial facts:

* prior to trial, the prosecution obtained immunity approval for Scribner, listed her on its witness list, and during its nine week case in chief, expressed every intention of granting Scribner immunity;

* the prosecution forced Scribner's sequestration, over Mohney's objection, by *affirming* on the record that Scribner would be granted immunity; and

* at no time did the prosecution express concern that it would be hindered in a future prosecution of Scribner.

In fact, the prosecution's concerns regarding a future prosecution of Scribner were manufactured after the fact in order to legitimize its unfair conduct in destroying Mohney's ability to present an effective defense.

The Sixth Circuit rejected Mohney's argument concerning the prosecution's misuse of its immunity power, but made this finding:

> "It is clear that the government kept out important and relevant testimony of how the returns were prepared, including Mohney's involvement." *United States v. Mohney*, 949 F.2d 1397 (6th Cir. 1991).

By manipulating its immunity power, the government has, in a tax prosecution, kept out important and

relevant testimony of how the returns were prepared, including Mohney's involvement. This constitutes a denial of due process.

CONCLUSION

A prosecutor's immunity power is a formidable tool in the prosecution of criminal activity. But as courts have recognized, that immunity power may not be misused so as to deny a defendant a defense, or to distort the fact-finding process. Whether a court uses its supervisory powers to ensure that a defendant obtains exculpatory and essential testimony, or whether a court exercises its supervisory power and dismisses a prosecution based on government misconduct, defendants must not be deprived of due process by the prosecution's manipulation of its immunity power. The prosecution must not be permitted to misuse its immunity power and immunize those witnesses it needs, and at the same time sandbag a defendant's ability to present an effective defense by denying immunity to witnesses he needs.

Where, as here, the prosecution has kept out important and relevant testimony of how the returns were prepared, including Mohney's involvement, and the testimony was intentionally kept out through the misuse of its immunity power, a denial of due process has occurred.

For this reason, and because the issue is of constitutional importance and has not been addressed by this

Court, Mohney respectfully seeks an order granting his Petition for a Writ of Certiorari.

Respectfully submitted,

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Dated: February 24, 1992

APPENDIX A

RECOMMENDED FOR FULL TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

No. 90-1527

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *v.* HARRY V. MOHNEY, *Defendant-Appellant.*	))))))	ON APPEAL from the United States District Court for the Eastern District of Michigan

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Decided and Filed November 27, 1991

Before: RYAN and BOGGS, Circuit Judges; and DOWD, District Judge.*

RYAN, Circuit Judge. Defendant Harry Mohney appeals his conviction for filing false individual income tax returns, in violation of 26 U.S.C. § 7206(1), and aiding and assisting in filing false corporate tax returns, in violation of 26 U.S.C. § 7206(2). The following issues are before us on appeal:

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*The Honorable David D. Dowd, Jr., United States District Judge for the Northern District of Ohio, sitting by designation.

1. Whether prosecutorial misconduct and judicial errors deprived Mohney of a fair trial and the right to present a defense;

2. Whether the district court erred in denying the motion to suppress evidence obtained through a search warrant;

3. Whether the district court abused its discretion in rulings regarding the summary witness testimony;

4. Whether the district court erred in denying the motion for judgment of acquittal based on the insufficiency of the evidence;

5. Whether the district court erred in refusing Mohney's motion to dismiss Counts IV-VI based on a closing agreement Mohney reached with the IRS; and

6. Whether the district court impermissibly restricted Mohney's right to present a defense by refusing to permit him to examine witnesses concerning the closing agreement and by quashing subpoenas of witnesses to testify regarding the agreement?

We agree with the district court's disposition of these matters and therefore affirm.

I.

In 1966, Harry Mohney began acquiring what are euphemistically known by some as "adult entertainment" businesses which he ran as a sole proprietorship. These businesses included theaters, bookstores, peep machines, and novelty and film distributors, all featuring sex-oriented "entertainment." He organized each aspect of the

business as a separate corporation. Most of these businesses had offices in Durand, Michigan. Mohney formed Modern Bookkeeping Services ("MBS") to handle and centralize the bookkeeping and tax preparation aspects of his businesses. He hired Elizabeth Scribner as the manager of MBS.

In 1984, federal agents, investigating a pattern of arsons at adult theaters, executed a search warrant of MBS headquarters. During the search, agents seized $400,000 in currency and records indicating that Mohney had not declared income collected from International Amusement's ("IA") peep machines. The income was skimmed by the route drivers who, after collecting coins from the peep machines, paid the location managers a "split" prior to recording the coins as income in the corporation's books. Based on these records, the government obtained an indictment against Mohney and three MBS employees.

Count I charged Mohney, Scribner, Thomas Tompkins (MBS' accountant), and Lee Klein (an attorney retained by MBS) with conspiring to defraud the IRS, in violation of 18 U.S.C. § 371. The district court dismissed this charge prior to trial.[1] The remaining counts named only Mohney. Counts II-IV charged Mahoney with filing false individual income tax returns for the calendar years 1981-83, respectively, in violation of 26 U.S.C. § 7206(1). Counts V-VII charged that Mohney willfully aided and assisted in the filing of false corporate tax returns for Otis

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[1] The dismissal of this charge was reversed in *United States v. Mohney*, No. 90-1738 (6th Cir. Nov. 27, 1991).

Mohney, Inc. ("OMI"), later IA, for the fiscal years 1982-84, respectively, in violation of 26 U.S.C. § 7206(2).

At trial, the government called fifty-two witnesses over a nine-week period. Many of these witnesses were former MBS employees who testified, under a grant of immunity, that Mohney was not actively involved in preparing the tax returns. Route drivers, who paid the splits to the location managers, also testified under immunity.

Key witnesses for the government were Kenneth and Barbara Goodrich, both of whom were directly involved with keeping IA's books. Pursuant to an immunity grant, the Goodriches testified concerning a two percent bonus Kenneth received, based on the revenue of certain peep machines. The calculation of this bonus showed that the peep machines produced income that Mohney had not declared.

A number of witnesses, including both Mohney's ex-wife and his former girlfriend, Gail Parmentier, testified that Mohney used cash to pay for living expenses, travel, family support, and film production. Witnesses involved in the sex-oriented film business testified that it was standard procedure to pay expenses for such films in cash. Parmentier also testified about her illicit relationship with Mohney.

The government concluded its case by presenting two summary witnesses, IRS Revenue Agents Robert Bednarczyk and Kenneth Peterson. Bednarczyk summarized the evidence regarding the corporate tax returns and presented his estimate of IA's revenue understatement on the individual returns. Peterson summarized the evidence regarding the individual returns and gave an

estimate of the understatement. The district court denied a defense motion to sequester these witnesses to prevent Peterson from relying on Bednarczyk's testimony.

The government did not call MBS manager Scribner as a witness, although she had been listed on its witness list. The government also refused to grant her immunity. Mohney attempted to call her as a witness, but she filed an affidavit asserting that she would invoke her Fifth Amendment privilege if called. The government also did not call or grant immunity to accountant Tompkins or attorney Klein.

Mohney's defense focused on his claimed peripheral and infrequent involvement with the businesses. He alleges that he was prevented from effectively presenting his defense because Jack Mohney, who handled IA's revenues and splits, was deceased, and because the government refused to call the only witnesses with direct knowledge of the IA returns: Tompkins, Scribner, and Klein.

The jury found Mohney guilty on each charge. The district court sentenced him to concurrent three-year terms of imprisonment on Counts II-VI, imposed a four-year probation term on Count VII, and fined him a total of $255,000. The court also imposed a special condition of probation requiring Mohney to pay back taxes found to be due and owing by the IRS.

II.

A.
Right to a Fair Trial

Mohney contends that prosecutorial misconduct, compounded by the district court's errors, denied him a fair trial. In evaluating this claim, we recall that "the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 219 (1982).

1.
Immunity

Mohney alleges that the prosecutor's refusal to grant immunity to Tompkins, Scribner, and Klein, who best understood MBS' operations and were crucial to his defense, while granting immunity to 20 other witnesses and after indicating that the three would receive immunity and testify, amounted to prosecutorial misconduct. Mohney also protests the district court's refusal to compel the prosecution to grant immunity. The government responds that it is not obligated to grant immunity to key defense witnesses and that it properly refused to grant immunity to witnesses who were putative defendants.

The grant of immunity by a prosecutor is governed by 18 U.S.C. § 6002 *et seq*. This statute gives the executive branch sole authority to grant "use immunity" to witnesses. 18 U.S.C. § 6003; *see also United States v. Hooks*, 848 F.2d 785, 798 (7th Cir. 1988). In exercising this power, the statute gives the prosecutor considerable discretion to

request immunity when "in his judgment" it is "necessary to the public interest." *Id.* The statute does not require the government to grant a defense witness immunity. *Id.* at 799.

Two theories have emerged under which defendants would be entitled to a grant of immunity for prospective defense witnesses. The first theory, rejected by most courts, allows immunity for defense witnesses when necessary for an effective defense. The second theory provides immunity to remedy prosecutorial misconduct.

Under the effective defense theory, immunity is available when it is properly sought in the district court, the witness is available to testify, the proffered testimony is both essential and clearly exculpatory, and no strong governmental interests countervail against an immunity grant. *Virgin Islands v. Smith,* 615 F.2d 964, 972 (3d Cir. 1980). Although our circuit recognized the serious problems refusal to extend immunity may present for defendants wishing to introduce essential evidence not otherwise available, we have held that federal courts do not have the inherent power to immunize witnesses whose testimony is essential to an effective defense. *United States v. Pennell,* 737 F.2d 521, 526-27 (6th Cir. 1984), *cert. denied,* 469 U.S. 1158 (1985). We rejected this theory because it would violate separation of powers to recognize an inherent judicial right to grant immunity when immunity is a legislative creation explicitly entrusted to the executive branch. *Id.* at 527. Compelled judicial use immunity could also impair the subsequent prosecution of the witness. *United States v. Thevis,* 665 F.2d 616, 640 (5th Cir.), *cert. denied,* 459 U.S. 825 (1982). If the government will be limited to prosecuting either the

defendant or the immunized witness because it will not be able to prove that the immunized testimony would not taint the prosecution of the witness, the choice of which one to prosecute should rest with the government, not with the courts. *Id; Pennell*, 737 F.2d at 528. The majority of other circuits have also rejected this theory. *United States v. Anguilo*, 897 F.2d 1169 (1st Cir.), *cert. denied*, 111 S.Ct. 130 (1990); *United States v. Paris*, 827 F.2d 395 (9th Cir. 1987); *United States v. Tindle*, 808 F.2d 319, 325 (4th Cir. 1986), *cert. denied*, 490 U.S. 1114 (1989); *United States v. Sawyer*, 799 F.2d 1494, 1506 (11th Cir. 1986), *cert. denied sub nom., Leavitt v. United States*, 479 U.S. 1069 (1987); *Thevis*, 665 F.2d 616; *United States v. Turkish*, 623 F.2d 769 (2d Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981); *In re Daley*, 549 F.2d 469, 479 (7th Cir.), *cert. denied*, 434 U.S. 829 (1977); *United States v. Graham*, 548 F.2d 1302, 1315 (8th Cir. 1977); *Earl v. United States*, 361 F.2d 531, 534-35 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921 (1967).

Even if we accepted the effective defense theory, Mohney still could not prevail on the facts of this case. Immunity under this theory is not available if a strong countervailing government interest exists, such as a legitimate interest in prosecuting the witness where no appropriate safeguards are available. *Smith*, 615 F.2d at 973. The government here indicted Tompkins, Scribner, and Klein, along with Mohney. Although the district court dismissed the charge in the indictment naming the three potential witnesses, the dismissal was subject to a motion to reconsider throughout trial and was reversed on appeal. Moreover, even if the appeal had failed, the prosecution could have pursued charges against Tompkins, Scribner, and

Klein for conspiracy to file false returns. Thus, the prosecution had a legitimate interest in prosecuting the witnesses.

This circuit has yet to rule on the second theory for granting immunity, to remedy prosecutorial misconduct. *Pennell*, 737 F.2d at 526. The theory was briefly considered in a recent unpublished opinion but found inapplicable to the facts in the case. *United States v. Doss*, No. 90-1447 (6th Cir. Feb. 6, 1991). Under this theory, due process requires an immunity grant where the prosecution abuses its discretion by intentionally attempting to distort the fact-finding process. *Angiulo*, 897 F.2d at 1191. Immunity under this theory should not be granted lightly. *Smith*, 615 F.2d at 968. The defendant must show " 'that the government's decisions were made with the deliberate intention of distorting the judicial fact finding process.' " *Id.* (quoting *United States v. Herman*, 589 F.2d 1191, 1204 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979)). Mohney contends that the government here deliberately withheld immunity in order to keep necessary exculpatory evidence from the jury. It is clear that the government kept out important and relevant testimony of how the returns were prepared, including Mohney's involvement. The prosecution, however, is only prevented from refusing to immunize a witness when the prosecution's "sole desire" is to keep exculpatory testimony from the jury. *Angiulo*, 897 F.2d at 1193. The prosecution may properly refuse to immunize a witness where it does not wish to hinder future criminal prosecutions of the witnesses. *Id.*

Mohney also argues that the government's selective grants of immunity to its own witnesses, while denying immunity to his witnesses, deprived him of a fair trial.

Selective grants of immunity could violate due process where they produce " 'egregiously lopsided access to evidence.' " *Hooks*, 848 F.2d at 802-3 (quoting *United States v. Buljubasic*, 808 F.2d 1260, 1268 (7th Cir.), *cert. denied*, 484 U.S. 815 (1987); *seel also United States v. De Palma*, 476 F.Supp. 775, 781 (S.D.N.Y. 1979). A defendant, however, does not have a right to have his witnesses immunized simply because the prosecution relies on immunized witnesses to make its case. *See United States v. Chagra*, 669 F.2d 241, 259 (5th Cir.), *cert. denied*, 459 U.S. 846 (1982); *see also Hooks*, 848 F.2d 785.

> [T]he balance between the government's interest in prosecuting accused felons and the accused's interest in presenting exculpatory and otherwise unobtainable evidence should not be inflexibly resolved by the fortuity that the government grants immunity to a particular witness in a particular case. If the government's prosecutorial interest outweighs a defendant's interest in presenting such evidence, . . . then the government's interest also outweighs any abstract concern with symmetry.

Chagra, 669 F.2d at 259. The government had already indicted Tompkins, Scribner, and Klein and thus had a real and legitimate interest in prosecuting them. Although our circuit has not directly addressed the issue of selective immunity grants, we have noted problems with compelling the prosecution to grant immunity to potential defendants:

> [T]he government as a practical matter may encounter great difficulty in satisfying the "heavy burden" of proving that its evidence

> against the witness is neither directly nor indirectly traceable to the immunized testimony . . . [T]he government in almost all such cases would be constrained to curtail the cross-examination of the immunized witnesses in order to "narrow the scope of the testimony that the witness will later claim tainted his subsequent prosecution."

Pennell, 737 F.2d at 528 (quoting *Turkish*, 623 F.2d at 775). In light of these concerns, we do not believe that selective immunity grants violated due process on these facts.

Because Mohney failed to establish that he was entitled to a judicially compelled immunity grant, even if our circuit were to recognize such a judicial power, we hold that the district court properly refused to order the prosecution to grant immunity to Tompkins, Scribner, and Klein.

2.
Other Allegations of Unfairness

Mohney raises other allegations of prosecutorial misconduct and judicial errors depriving him of a fair trial. First, he protests the district court's refusal to give the missing witness instruction which he requested, although the court did give a missing witness instruction. Second, he objects on relevancy grounds to the prosecution's references to the nature of his business and his illicit relationship with a seventeen-year-old female, and to the testimony of his former partner, Burton Gorelick, regarding a skim of profits with Mohney from theaters and bookstores. We find these remaining allegations wholly without merit.

B.
Motion to Suppress

Mohney argues that the district court erred in refusing to suppress evidence found during searches of MBS and OMI, IA's predecessor. The government conducted these searches under the authority of three warrants: two authorizing the search of MBS and one authorizing the search of Entertainment World, another Mohney business located in the same building as OMI. On appeal, Mohney argues that the evidence should have been suppressed because the government failed to show probable cause and because the warrants failed to state with sufficient particularity the items to be seized. We need not reach these issues, however, as Mohney does not have standing to challenge these searches.

The "rights assured by the Fourth Amendment are personal rights, [which] . . . may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed by the search and seizure." *Simmons v. United States*, 390 U.S. 377, 389 (1968), *quoted in Rakas v. Illinois*, 439 U.S. 128, 138 (1978). In some circumstances, an officer of a corporation may be a "person aggrieved" by a corporate search and seizure and thus have standing to challenge the search. For example, in *Henzel v. United States*, 296 F.2d 650 (5th Cir. 1961), the appellant could challenge the search because he was the organizer, sole shareholder, and president of the corporation, who prepared much of the material seized from his office, where he spent the greater part of every working day. Where the documents seized were normal corporate records not personally prepared by the defendant and not taken from his personal office, desk or files, in a search that was not

directed at him personally, the defendant cannot challenge a search as he would not have a reasonable expectation of privacy in such materials. *United States v. Britt*, 508 F.2d 1052, 1055 (5th Cir.), *cert. denied*, 423 U.S. 825 (1975). *See also Williams v. Kunze*, 806 F.2d 594 (5th Cir. 1986). Without a reasonable expectation of privacy in the seized materials, an officer may not challenge a search of the corporation:

> When a man chooses to avail himself of the privilege of doing business as a corporation, even though he is its sole shareholder, he may not vicariously take on the privilege of the corporation under the fourth amendment; documents which he could have protected from seizure, if they had been his own, may be used against him, no matter how they were obtained from the corporation. Its wrongs are not his wrongs; its immunity is not his immunity.

Lagow v. United States, 159 F.2d 245, 246 (2d Cir. 1946), *cert. denied*, 331 U.S. 858 (1947, *quoted in Britt*, 508 F.2d at 1055; *cf. United States v. Salvucci*, 448 U.S. 83, 91-93 (1980). Mohney argues that he had a reasonable expectation of privacy because MBS' and OMI's offices were not open to the public. However, it is hard to see how Mohney could have a reasonable expectation of privacy in documents he claimed to be completely uninvolved in preparing and which were kept in offices he claimed to rarely visit. Nor were the searches targeted at "getting" Mohney; the searches were conducted as part of an arson investigation begun by Indiana officials. Mohney, then, did not have a reasonable expectation of privacy in the materials seized that would permit him to challenge the search warrants

and thus the evidence seized during these searches was properly admitted.

C.
Summary Witnesses

The prosecution presented the testimony of two summary witnesses, IRS Agents Bednarczyk and Peterson. These witnesses attended the entire trial and reviewed the voluminous documents entered into evidence in order to calculate the amount of gross income and/or gross receipts underreported on IA's and Mohney's tax returns. Bednarczyk's testimony addressed the corporate returns and Peterson testified as to the income underreported on the individual returns. Both used summary schedules which were admitted into evidence.

Mohney raises several objections to the testimony of Bednarczyk and Peterson. First, he argues that the district court erred in denying his motion to sequester Peterson during Bednarczyk's testimony. Second, he submits that they should not have been allowed to use summary charts. Third, he contends that the summary witnesses should not have been given access to documents not provided to the defense and not submitted as evidence. Fourth, he contends that the trial court erred in allowing the summary witnesses to render opinions on the ultimate issue, whether funds were diverted.

1.

Exclusion of Witnesses

Federal Rule of Evidence 615 provides, in relevant part, that:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of . . . (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause.

Mohney moved to sequester Peterson under this rule so that Peterson, in testifying regarding the individual returns, would not "parrot" Bednarczyk's calculations and testimony. Because Peterson's testimony was based on Bednarczyk's calculations, the court denied the sequestration request so that if cross-examination should bring out any facts not considered by Bednarczyk in making his calculations, Peterson would be present to ensure the accuracy and completeness of his own testimony.

The decision to permit a witness to remain in the courtroom "is within the discretion of the trial judge and should not normally be disturbed on appeal." *Morvant v. Construction Aggregates Corp.*, 570 F.2d 626, 630 (6th Cir.), *cert. dismissed*, 439 U.S. 801 (1978). This court has recognized that

> the presence in the courtroom of an expert witness who does not testify to the facts of the case but rather gives his opinion based upon the testimony of others hardly seems suspect and will in most cases be beneficial, for he will be

> more likely to base his expert opinion on a more accurate understanding of the testimony as it evolves before the jury.

Id. at 629-30. Therefore, "where a fair showing has been made that the expert witness is in fact required for the management of the case, and this is made clear to the trial court, we believe that the trial court is bound to accept any reasonable, substantiated representation to this effect by counsel." *Id.* at 630. The prosecution explained that the calculations of the individual returns depended on the calculations of the corporate returns and thus it would be beneficial for Peterson to hear Bednarczyk's testimony. The court thus did not abuse its discretion in allowing Peterson to remain in the courtroom. However, even if the court had abused its discretion, Mohney failed to show that the asserted error " 'created sufficient prejudice to require reversal.' " *United States v. Bobo*, 586 F.2d 355, 366 (5th Cir. 1978) (quoting *United States v. Warren*, 578 F.2d 1058, 1076 (5th Cir. 1978) (*en banc*), *cert. denied*, 446 U.S. 956 (1980)), *cert. denied sub nom., Rowan v. United States*, 440 U.S. 976 (1979).

Mohney contends that the court should have sequestered Peterson because this court's decision in *United States v. Pulley*, 922 F.2d 1283, 1285-86 (6th Cir. 1991), *petition for cert. filed*, 59 U.S.L.W. 3825 (May 28, 1991), limits the government to designating only one agent-witness to represent it. *Pulley*, however, dealt with subsection (2) of Fed. R. Evid. 615 prohibiting the sequestration of "an officer or employee of a party which is not a natural person designated as its representative by its attorney." Fed. R. Evid. 615. Because this case involves subsection (3) and because the prosecution established

that both witnesses were "essential to the presentation of [its] cause" under that subsection, *Pulley* does not control.

2.
Flow Charts

Agent Bednarczyk used a chart as a visual aid in explaining how profits were skimmed. In commenting on such charts, this circuit has noted that "[t]here is an established tradition, both within this circuit and in other circuits, that permits a summary of evidence to be put before the jury with proper limiting instructions." *United States v. Scales*, 594 F.2d 558, 563 (6th Cir.), *cert. denied*, 441 U.S. 946 (1979). Such a limiting instruction should explain "that the chart is not itself evidence but is only an aid in evaluating the evidence." *Id.* at 564. The court here provided such an instruction. Before the chart was shown to the jury, the court cautioned that "this is generally known as a visual aid. It is not evidence at this point. It's a visual aid to verbal testimony." After the defense objected that the testimony based on the flow chart was improper as the jury would accept the facts shown in the chart as conclusively proven, the court once again reminded the jury that the chart served simply as the foundation for Bednarczyk's calculations. Finally, the district court instructed the jury:

> This witness has been qualified as an expert witness in the area of general accounting principals [sic] and knowledge of the Internal Revenue Code and the regulations under the Internal Revenue Code. He is not qualified of course to summarize testimony before you in this case. Therefore the diagram that you see before you is

> merely an explanation of his understanding of what the testimony has been with regard to the matters that are on that chart. It is not the subject of his expert testimony. It is the facts upon which his expert testimony is based.
>
> To the extent that those facts you find not be established in this case then you will determine whether or not and what effect if any the fact that something has not been established or something on that chart is inaccurate affects his expert opinion, whether it does or it does not is a matter for you. . . . I just want to indicate that that is not evidence in this case. It's merely before you as his understanding or the basis upon which he renders his opinion, his factual understanding of the flow.

Because the court instructed the jury very clearly that the flow charts were simply used to establish the basis of the calculations, it did not abuse its discretion in allowing their use.

3.
Witness Reliance on Documents Not Available to Defense

Mohney contends that the summary witnesses unfairly based their testimony on documents not available to the defense. He points to the testimony of Bednarczyk that he "had access to some backup information like the numerous other books and records of the corporation" and that he reviewed a grand jury transcript. He also notes Peterson's testimony that he read a special agent's report to which the defense did not have access. Mohney, however, through the government's disclosure

of Jencks Act materials, 18 U.S.C. § 3500, had all of the grand jury transcripts. Moreover, expert witnesses may properly base their opinions on evidence not presented at trial. Fed. R. Evid. 703. However, both witnesses explicitly stated that they had not based their calculations or testimony on material not in evidence. As Mohney cites no authority for the proposition that experts cannot use materials which they were exposed to outside of court and because the experts did not base their calculations upon these materials, no error occurred.

4.
Ultimate Issue Testimony

Mohney argues that the summary witness testimony was improper "ultimate issue" testimony which invaded the province of the jury. Mohney objects to the following testimony of Bednarczyk:

> Q. Mr. Bednarczyk, do you have an opinion as to whether or not currency picked up by route drivers was reported as part of the gross receipts?
>
> . . . .
>
> A. In my opinion the currency was not reported.

Peterson also testified that the currency did not reach the bank and thus was not reported. The court allowed this testimony to explain the basis for the witnesses' conclusions. Decisions regarding the admissibility of expert testimony are within the discretion of the trial court and ordinarily may be reversed only for abuse of discretion. *Hanson v. Parkside Surgery Center*, 872 F.2d 745, 750 (6th

Cir.), *cert. denied sub nom., Hanson v. Arrowsmith,* 110 S. Ct. 349 (1989).

Under Fed. R. Evid. 704(a), "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." However,

> [t]he abolition of the ultimate issue rule does not lower the bars so as to admit all opinions. Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time. These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day.

Fed. R. Evid. 704, Advisory Committee's Notes. The summary witnesses' testimony did not deprive the jury of its function by telling it what result to reach. As this court explained in reference to the opinion of another IRS agent:

> Appellant's argument that [the agent] usurped the function of the jury is also without merit. [The agent] did not give her opinion about whether appellant was guilty or not; she gave her opinion regarding whether tax was due and owing for the years in question in order to assist the jury in determining a fact in issue. There was no abuse of discretion. . . .

United States v. DeClue, 899 F.2d 1465, 1473 (6th Cir. 1990). Moreover, even if an ultimate issue was involved, the district court did not abuse its discretion in finding that

the testimony would be helpful to the jury in understanding the testimony of the expert witnesses because "an IRS expert's analysis of the transaction itself, which necessarily precedes his or her evaluation of the tax consequences, is . . . admissible evidence." *United States v. Windfelder*, 790 F.2d 576, 581 (7th Cir. 1986). In order for the jury to understand the calculations and thus determine whether they accepted the analysis of the two witnesses, they needed to understand the assumptions upon which the testimony and calculations were based.

D.
Motion for Judgment of Acquittal

After the guilty verdict, Mohney moved for a judgment of acquittal pursuant to Fed. R. Crim. P. 29 based on the insufficiency of the evidence. The district court denied the motion without explanation. On appeal, this court asks "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original).

Mohney was charged under 26 U.S.C. § 7206(1) for filing false individual income tax returns and § 7206(2) for aiding and assisting in filing false corporate tax returns. Those sections state:

> **(1) Declaration under penalties of perjury.** – Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which

> he does not believe to be true and correct as to every material matter; or
>
> **(2) Aid or assistance.** – Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document. . . .

Mohney argues that because the government failed to prove willfulness and knowledge, he should not have been convicted under section 7206(2). He challenges his conviction for underreporting his individual income under section 7206(1) based on the government's failure to show that he received the money allegedly skimmed from IA.

Mohney alleges that the prosecution failed to show that he willfully filed false returns. Willfulness under section 7206 "requires proof of specific intent to do something that the law forbids; more than a showing of careless disregard for the truth is required." *United States v. Loney*, 719 F.2d 1435, 1436 (9th Cir. 1983). A taxpayer's signature on a return does not in itself prove his knowledge of the contents, but knowledge may be inferred from the signature along with the surrounding facts and circumstances, and the signature is *prima facie* evidence that the signer knows the contents of the return. *United States v. Harper*, 458 F.2d 891, 894 (7th Cir. 1971), *cert. denied*, 406 U.S. 930 (1972). Such surrounding facts and circumstances include the defendant's knowledge of the

business' revenues, his active role in the operations, his hiring of the accounting firm, and his payment of the taxes. *Id.* at 895. The government here offered evidence that Mohney was aware of and involved in the tax preparation: for example, memoranda and correspondence regarding a donation of films to the National Sex Forum as a tax deduction in 1980 show that the idea originated with Mohney. Other memoranda between Mohney, Tompkins, and Klein also show [sic] Mohney's involvement in and awareness of the tax returns. Willfulness may also be shown through the government's evidence that Mohney knew about the skim and the falsity of the returns. Gorelick testified that they had an agreement during the relevant time period to skim profits from bookstores and theaters, and that they agreed not to report certain peep show revenues. Gorelick also testified that the skimming was done in order to pay less taxes. The government also showed proof that Mohney knew of the IA skim through memoranda written to Mohney's father and to his accountant asking that the currency from IA, kept at Jack Mohney's home, be delivered to Scribner every Monday, Wednesday, and Friday. This currency was not recorded in the corporate books. Finally, the willful intent to evade taxes was also shown by the testimony of Gail Parmentier that Mohney paid all of his expenses in cash so that the government could not keep track of his spendings, and that he frequently expressed hatred towards the government and likened the payment of taxes to enslavement. From this evidence, a reasonable juror could conclude that Mohney willfully filed false returns.

Mohney submits that the government's evidence was also insufficient to show that he received skimmed funds. The government, however, offered evidence showing Mohney's possession and control of diverted funds. Richard Hardy, a former bookkeeper of MBS, testified that Jack Mohney gave him money kept at Jack Mohney's home to give to Harry Mohney. Mohney's memorandum directing that the money kept at his father's home be given to Scribner three times per week is also evidence that he received the funds. Gorelick's testimony about how he split the skimmed profits from the bookstores and theaters with Mohney also shows that Mohney received the money skimmed from the peep shows. A reasonable juror could thus conclude that Mohney received the skimmed profits.

E.
Motion to Dismiss Based on Closing Agreement

Mohney brought a motion to dismiss based on a closing agreement which he entered into with the government pursuant to 26 U.S.C. § 7121. The district court denied the motion to dismiss because section 7122, not section 7121, covers compromises regarding criminal prosecutions, and because there was no evidence on the face of the document indicating that the parties intended it to preclude criminal prosecutions.

26 U.S.C. § 7121(a) provides:

> **(a) Authorization.** – The Secretary is authorized to enter into an agreement in writing with any person relating to the liability of such person (or of the person or estate for whom he

> acts) in respect of any internal revenue tax for any taxable period.

If such an agreement is approved, it is final and conclusive, unless there is a showing of fraud or malfeasance. 26 U.S.C. § 7121(b).

26 U.S.C. § 7122(a) provides:

> **(a) Authorization.** – The Secretary may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General or his delegate may compromise any such case after reference to the Department of Justice for prosecution or defense.

The closing agreement expressly stated that it was entered into pursuant to section 7121. The district court correctly concluded that such an agreement, particularly this agreement, does not cover criminal cases. Although section 7121 does not expressly state whether it covers criminal prosecutions, its failure to address a matter clearly stated in the following section may suggest it is not intended to cover criminal cases. Moreover, the language of section 7121(a) authorizing an agreement "with any person relating to the liability of such person . . . in respect of any internal revenue tax for any taxable period," does not indicate that closing agreements cover criminal prosecutions and penalties. Finally, nothing in the present closing agreement indicates that the parties intended it to cover criminal liability. The facts and objectives stated in the agreement relate only to suits brought by Mohney to claim refunds for the tax years 1971-83. The agreement details the overpayments and deficiencies for

the relevant years and obligates Mohney to dismiss his suit. It does not discuss criminal liability, penalties, or any obligation on the part of the government to cease its investigation. The district court, then, did not err in finding "it not credible that the IRS would have so intended [to cover criminal liability] without reducing that understanding to an explicit writing."

F.
Limitation of Cross-Examination Regarding Closing Agreement

Mohney alleges that the district court abused its discretion in refusing to permit cross-examination regarding the closing agreement and in granting a government motion to quash subpoenas of government witnesses with knowledge of the agreement. The government argues that the closing agreement was not relevant to any issue in this case. In reviewing these arguments, this court notes that the district court has broad discretion under Fed. R. Evid. 611 to limit the scope of cross-examination and that this court should only reverse for a clear abuse of discretion. *United States v. Mahar*, 801 F.2d 1477, 1495 (6th Cir. 1986). A decision to quash a subpoena should not be disturbed unless " 'fundamental rights were affected by the court's ruling.' " *Id.* at 1497 (citation omitted).

The district court refused to allow cross-examination regarding the agreement and quashed the subpoenas because it found that the agreement was not relevant to the issues before it. Mohney, citing *Jonson v. United States*, 281 F.2d 884 (9th Cir. 1960); *Rau v. United States*, 260 F. 131 (2d Cir. 1919); and *Willingham v. United States*, 208 F. 137

(5th Cir. 1913), argues that "a defendant in a tax prosecution is entitled to present any substantial evidence tending to support his defense that his criminal liability was the subject of a settlement agreement." The cases cited by Mohney, however, deal with compromises under section 7122. Unlike section 7121, section 7122 specifically states that an agreement made under its requirements relieves a defendant of criminal liability. Thus, the ability of a defendant to show a compromise under section 7122 would be relevant to a criminal defense, whereas showing that civil liability was determined would not be relevant to showing whether the defendant willfully filed false returns. The district court, then, did not abuse its discretion in refusing to allow cross-examination regarding an issue Mohney failed to show was relevant, nor did the court prejudice Mohney's rights by quashing subpoenas regarding that issue.

III.

For the reasons set forth, we **AFFIRM** Mohney's conviction.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION - FLINT

UNITED STATES OF AMERICA,

Plaintiff,

v.

HARRY V. MOHNEY,

Defendant.

_____/

CRIMINAL ACTION
NO: 88-CR-50062-FL

(Filed May 29, 1990)

ORDER

Prior to sentencing defendant on May 1, 1990, the Court ruled that the government's Motion to reconsider Order Striking Other Defendants was DENIED; defendant's Motion for Judgment of Acquittal was DENIED; and defendant's Motion for Evidentiary Hearing was DENIED as moot.

SO ORDERED.

Date: 5/29/90

/s/ Stewart A. Newblatt
STEWART A. NEWBLATT
5/29/90
United States District Judge

APPENDIX C

CONSTITUTION OF THE UNITED STATES OF AMERICA

ARTICLE V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except on cases arising in the land or naval forces, or in the Militia, when in actual service in time or War or public danger; nor shall any person be a subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defence [sic].

Supreme Court, U.S.
FILED
APR 24 1992
OFFICE OF THE CLERK

No. 91-1378

In the Supreme Court of the United States

OCTOBER TERM, 1991

HARRY V. MOHNEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General

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QUESTION PRESENTED

Whether the district court erred in refusing to order immunity for a prospective defense witness.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A27) is reported at 949 F.2d 1397.

JURISDICTION

The judgment of the court of appeals was entered on November 27, 1991. The petition for a writ of certiorari was filed on February 24, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on three counts of filing false individual income tax returns, in violation of 26 U.S.C. 7206(1), and on three counts of aiding and assisting

in the filing of false corporate tax returns, in violation of 26 U.S.C. 7206(2).

1. In 1966, petitioner began acquiring businesses in the "adult entertainment" industry, such as theaters, bookstores, peep machines, and novelty and film distributors, all of which featured sex-oriented entertainment. Pet. App. A3. Petitioner ran the businesses as a sole proprietorship, but organized each aspect of the business as a separate corporation. Pet. App. A2-A3. Petitioner formed Modern Bookkeeping Services (MBS) to handle the bookkeeping and tax preparation aspects of the businesses, and he hired Elizabeth Scribner to manage MBS. Pet. App. A3.

In 1984, federal agents executed a search warrant at MBS headquarters and seized $400,000 in currency and records indicating that petitioner had failed to report income that he skimmed from the peep machines of one of his businesses, International Amusements, Ltd. (IA). Pet. App. A3. Petitioner's technique was to have his "route drivers" collect the proceeds from the peep machines in coin and convert some of those proceeds into paper currency. When the route drivers returned to IA's offices, they deposited the coin proceeds into the bank, but retained the currency. For tax purposes, however, gross income was calculated based on the bank deposits, which did not include the currency. See Gov't C.A. Br. 5-6.

2. Petitioner was charged in a seven-count indictment with conspiring to defraud the United States, in violation of 18 U.S.C. 371, filing false personal income tax returns, in violation of 26 U.S.C. 7206(1), and causing the filing of false corporate tax returns, in violation of 26 U.S.C. 7206(2). Also charged in the conspiracy count were Elizabeth Scribner, the manager of MBS, and two other of petitioner's associates.

Prior to trial, the district court dismissed the conspiracy count. Relying on the Sixth Circuit's decision in *United States* v. *Minarik*, 875 F.2d 1186 (1989), the court held that the indictment impermissibly charged the conspiracy under the "defraud" clause of Section 371, and should have charged the defendants with conspiracy to commit an offense under the "offense" clause of Section 371. Petitioner went to trial alone on the substantive counts, while the government appealed the dismissal of the conspiracy count against petitioner and his co-conspirators.[1]

The government called 52 witnesses during the trial, many of whom, including former MBS employees and route drivers, testified under grants of immunity. Two witnesses directly involved in keeping the books of IA and its predecessor company testified that one of petitioner's associates received a two percent bonus based on the revenue of certain peep machines. A calculation of the bonus revealed that the peep machines produced income that petitioner had not declared. Pet. App. A3-A4.

The government did not call as witnesses any of the co-conspirators charged in the conspiracy count of the indictment, and refused to grant Ms. Scribner immunity. When petitioner attempted to call Ms. Scribner as a witness, she filed an affidavit stating that she would invoke her Fifth Amendment privilege and refuse to testify. Pet. App. A5. The jury convicted petitioner on all counts.

2. The court of appeals affirmed. The court rejected petitioner's argument that he was denied a

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[1] After petitioner's trial, the Sixth Circuit reversed the dismissal of the conspiracy count, holding that the indictment properly charged the defendants with a conspiracy to defraud the United States. *United States* v. *Mohney*, 949 F.2d 899 (1991).

fair trial when the prosecution and the district court declined to immunize Scribner and the two other co-conspirators so that they could testify as defense witnesses. Pet. App. A6-A11.[2] The court held that federal courts do not have the inherent power to immunize defense witnesses. Pet. App. A7. It further held that even if the courts had such power, immunity was not available in this case because the government had a legitimate interest in prosecuting the co-conspirators. Pet. App. A8. The court also held that the prosecutor had not engaged in misconduct that violated petitioner's right to due process and required immunity as a remedy. Pet. App. A9-A11.

ARGUMENT

Petitioner argues (Pet. 6-15) that the district court's refusal to order immunity for Scribner violated the Due Process Clause. Petitioner urges that immunity should have been granted on one of two theories: first, the district court should have granted Scribner immunity because her testimony was essential to an effective defense; second, the district court should have ordered the government to grant statutory immunity to Scribner to prevent the government from deliberately distorting the fact-finding process.

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[2] The court of appeals also rejected petitioner's arguments that the district court (1) erred in denying a motion to suppress evidence seized pursuant to the search warrant (Pet. App. A12-A14); (2) abused its discretion in ruling on the testimony of the summary witnesses (Pet. App. A14-A21); (3) erred in denying a motion for a judgment of acquittal (Pet. App. A21-A24); (4) erred in denying petitioner's motion to dismiss based on a closing agreement with the Internal Revenue Service (Pet. App. A24-A26); and (5) erred in refusing to permit cross-examination concerning the closing agreement (Pet. App. A26-A27). Petitioner does not pursue any of those issues in his petition.

A district court does not have authority to immunize a witness absent a request from the government. The federal immunity statute, 18 U.S.C. 6001 *et seq.*, vests the power to seek immunity in the Executive Branch. In discussing the immunity statutes, this Court has explained that the authority to immunize witnesses "is peculiarly an executive one, and only the Attorney General or a designated officer of the Department of Justice has authority to grant use immunity." *Pillsbury Co.* v. *Conboy*, 459 U.S. 248, 261 (1983); see also *United States* v. *Doe*, 465 U.S. 605, 616-617 (1984). Not surprisingly, the great majority of the courts of appeals, like the court below, have held that judges may not immunize defense witnesses without a request from the prosecution.[3]

Petitioner's claim (Pet. 9-12) that the decision in this case conflicts with a decision of the Third Circuit is mistaken. The Third Circuit has held that

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[3] See, *e.g.*, *United States* v. *Hooks*, 848 F.2d 785, 803 (7th Cir. 1988); *Mattheson* v. *King*, 751 F.2d 1432, 1443 (5th Cir. 1985), cert. dismissed, 475 U.S. 1138 (1986); *United States* v. *Pennell*, 737 F.2d 521, 527 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1985); *Autry* v. *Estelle*, 706 F.2d 1394, 1401-1402 (5th Cir. 1983), cert. denied, 465 U.S. 1085 (1984); *United States* v. *Heffington*, 682 F.2d 1075, 1080-1081 (5th Cir. 1982), cert. denied, 459 U.S. 1108 (1983); *United States* v. *Karas*, 624 F.2d 500, 505 (4th Cir. 1980), cert. denied, 449 U.S. 1078 (1981); *United States* v. *Turkish*, 623 F.2d 769, 771-779 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981); *United States* v. *Graham*, 548 F.2d 1302, 1315 (8th Cir. 1977); *United States* v. *Caldwell*, 543 F.2d 1333, 1356 n.115 (D.C. Cir. 1975), cert. denied, 423 U.S. 1087 (1976); *United States* v. *Alessio*, 528 F.2d 1079, 1080-1082 (9th Cir.), cert. denied, 426 U.S. 948 (1976); see also *United States* v. *Capozzi*, 883 F.2d 608, 613 (8th Cir. 1989), cert. denied, 495 U.S. 918 (1990); *United States* v. *Eagle Hawk*, 815 F.2d 1213, 1217 (8th Cir. 1987), cert. denied, 484 U.S. 1012 (1988).

immunity may be granted on the court's initiative when it is necessary to protect the defendant's efforts to mount a defense. *Government of Virgin Islands* v. *Smith*, 615 F.2d 964 (1980). The Third Circuit has not had occasion since this Court's decisions in *Doe* and *Conboy* to reconsider its ruling in *Smith*, and the continued vitality of that decision is thus uncertain. But even assuming *Smith* retains vitality, petitioner would not be entitled to immunity for Scribner under the *Smith* approach.

The Third Circuit narrowly limited the scope of its rule:

> [I]mmunity must be properly sought in the district court; the defense witness must be available to testify; the proffered testimony must be clearly exculpatory; the testimony must be essential; and there must be no strong governmental interests which countervail against a grant of immunity.

Smith, 615 F.2d at 972.[4] In this case, there was a strong countervailing governmental interest. As the court of appeals explained, Pet. App. A8-A9, "[t]he government here indicted * * * Scribner * * * along with [petitioner]" and had a legitimate interest in

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[4] The Third Circuit in *Smith* made clear that the trial court should not grant immunity where "the proffered testimony is found to be ambiguous, not clearly exculpatory, cumulative or if it is found to relate only to the credibility of the government's witnesses." 615 F.2d at 972. Petitioner asserts that "Scribner's testimony would have been exculpatory." Pet. 13. However, when petitioner specifically recounts the purposes for which Scribner was to have been called, see Pet. 4, it appears that her testimony would have been largely cumulative and not clearly exculpatory, and thus would not have met the *Smith* criteria in any event.

prosecuting her.[5] Compelled judicial use immunity could have impaired her subsequent prosecution. Pet. App. A7; see also *United States* v. *Pennell*, 737 F.2d 521, 529 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1985); *United States* v. *Thevis*, 665 F.2d 616, 640 (5th Cir.), cert. denied, 459 U.S. 825 (1982). Thus, the court of appeals correctly held that, even if this case had arisen in the Third Circuit and been decided under the standards articulated in *Smith*, petitioner would not have prevailed. Cf. *United States* v. *Lowell*, 649 F.2d 950, 965 (3d Cir. 1981) (upholding denial of defense witness immunity in part because government "may yet" prosecute witness for whom immunity was sought).

Petitioner's second theory is also unavailing. Statutory immunity for Scribner was not required in order to prevent deliberate distortion of the fact-finding process. The courts that have addressed that theory have held that district courts may compel the government to immunize defense witnesses in only two circumstances: where government intimidation provokes a defense witness into invoking his Fifth Amendment privilege, thereby withholding testimony that otherwise would have been available to the defense, or where the government withholds immunity from a defense witness for the sole purpose of keeping exculpatory evidence from the jury. See, *e.g.*, *United States* v. *Pinto*, 850 F.2d 927, 932 (2d Cir.), cert. denied, 488 U.S. 867 (1988); *United States* v.

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[5] As the court of appeals also noted, Pet. App. A8-A9, while the district court dismissed the conspiracy charge naming Scribner, the dismissal was subject to a motion to reconsider throughout the trial and was reversed on appeal. Moreover, even if the appeal had been unsuccessful, the prosecution could have pursued charges against Scribner for conspiracy to file false returns. Pet. App. A9.

Hooks, 848 F.2d 785, 799 (7th Cir. 1988); *United States* v. *Lord*, 711 F.2d 887, 891 (9th Cir. 1983).

Petitioner does not argue that prosecutorial misconduct caused Scribner to assert her Fifth Amendment privilege and withhold testimony that otherwise would have been available to him. See *United States* v. *Angiulo*, 897 F.2d 1169, 1192 (1st Cir.), cert. denied, 111 S. Ct. 130 (1990). He merely asserts (Pet. 12) that it was unfair for the prosecution to grant immunity to its own witnesses while refusing to grant immunity to Scribner. Petitioner claims (Pet. 12-14) that the government refused to grant Scribner immunity for the purpose of distorting the fact-finding process.

There is no basis for petitioner's claim that the prosecution declined to grant Scribner immunity for the purpose of keeping exculpatory testimony from the jury. As previously discussed, the government provided valid reasons for its objection to immunizing Scribner—her indictment as a co-conspirator with petitioner and the desire not to hinder her prosecution for the very same conduct with which petitioner was charged. Moreover, petitioner did not have the right to have Scribner immunized simply because the prosecution had immunized witnesses in its case against him. *United States* v. *Hooks*, 848 F.2d at 802; *United States* v. *Chagra*, 669 F.2d 241, 259 (5th Cir.), cert. denied, 459 U.S. 846 (1982); *United States* v. *Turkish*, 623 F.2d at 774-775. As the Fifth Circuit noted in *Chagra*, 669 F.2d at 259,

> the balance between the government's interest in prosecuting accused felons and the accused's interest in presenting exculpatory and otherwise unobtainable evidence should not be inflexibly resolved by the fortuity that the government grants immunity to a particular witness in a

> particular case. If the government's prosecutorial interest outweighs a defendant's interest in presenting such evidence * * * then the government's interest also outweighs any abstract concern with symmetry.

In light of the government's strong interest in prosecuting Scribner, the government's refusal to immunize Scribner did not violate petitioner's right to due process.[6]

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[6] Petitioner repeatedly asserts that the "prosecution *affirmed* to the court and the defense that it intended to immunize [Scribner] and call her as a witness," and that "[t]he prosecution's stated intention to grant Scribner immunity and call her as a witness was relied upon by [petitioner]." Pet. 5. See also Pet. 12, 14. Those assertions are mistaken. As the district court explained, the government had to include all possible witnesses on its witness list because "[the prosecutors] have to tell the jury who the witness may be and find out whether or not anybody knows them." The district court added that "if [the government] didn't put her name on the list and then made a determination a week before the end of trial they were going to call her in rebuttal and give her use immunity they wouldn't have been able to do it because she wasn't on the list." 4/6/89 Tr. 54-55. At sentencing, the district court repeated its finding that "[t]here was never any promise to call Ms. Scribner," and that "[b]ecause the government never 'promised' [petitioner], the court or the jury that it would call or immunize Elizabeth Scribner, [petitioner's] claim that he relied upon such promise to his detriment is meritless." 5/1/89 Tr. 52-53.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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